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NO. 82-605

In the Supreme Court of the United States

OCTOBER TERM, 1982

A.W.I., INC.—Petitioner

VERSUS

AMERICAN INSURANCE CO.—Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Employment held to be maritime under the Longshoremen and Harbor Workers Compensation Act prior to the 1972 amendments thereof was not stripped of its maritime character by virtue of such amendments; and employees covered by the Act prior to the 1972 amendments and injured over navigable waters are still entitled to the benefits thereof.

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ARGUMENT

The majority opinion of the Fifth Circuit on rehearing en banc[1], wherein ten judges joined and two dissented, is an eloquent response to petitioner's petition for writ of certiorari and requires only minimal supplementation.

The statement on page 10 of the petition that "In other references, Congress declared that a person was not intended to be covered simply because he happened to be in

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[1] *Boudreaux v. American Workover, Inc.*, 5 Cir., 680 F.2d 1034.

in a covered area" has reference to the following statements in the Senate and the House reports on the 1972 amendments declaring:

> "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity."[2]

What this had related to was the following prior statement in the House Report:

> "The present Act, *insofar as longshoremen and shipbuilders and repairmen are concerned,* covers only injuries which occur 'upon the navigable waters of the United States.' Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs."[3]

The reference in the first quotation hereinabove to "employees who are not engaged in loading, unloading, repairing, or building a vessel" is to the employees in the second quotation described as "longshoremen and ship-

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[2] H.R. Rep. No. 1441, 92d Cong., 2d Sess. 11, reprinted in [1972] U.S. Code Cong. & Ad. News 4698, 4708; S. Rep. No. 1125, 92d Cong., 2d Sess. 13.

[3] H.R. Rep. No. 1441, 92d Cong. 2d Sess. 11, reprinted in [1972] U.S. Code Cong. & Ad. News 4698, 4707-08 (emphasis added).

builders and repairmen". Essentially, what the committee was saying was that as to employees who were injured shoreside and did not fall within the aforementioned employment categories they would not be covered simply because they were injured in an area adjoining navigable waters. The committee certainly was not inferring that employees covered by the act prior to the 1972 amendments and injured over navigable waters should not be covered.

Reliance by petitioner on *Thibodaux v. Atlantic Richfield Co.*, 5 Cir., 580 F.2d 841, certiorari denied, 442 U.S. 909, 99 S.Ct. 2820, 61 L.Ed.2d 274, and *Rodrigue v. Aetna Casualty and Surety Company*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 is clearly misplaced. In holding that the employee in *Thibodaux* was not covered by the LHWCA, the Court stated "The deceased simply is not the amphibious worker sought to be protected by the 1972 amendments to the LHWCA because his work was performed on land", a factor which distinguishes that case and the instant case in that the only connection that the plaintiff in *Thibodaux* had with maritime activities was that he was transported to his place of employment by boat. *Rodrigue* found fixed drilling structures to be "Artificial islands" as though they were federal enclaves in an upland state and held that they were not within admiralty jurisdiction, as a result whereof the Outer Continental Shelf Lands Act[4] was applicable thereto. On the other hand, Boudreaux was injured while working aboard a

[4] 43 U.S.C. §1331 et seq.

workover barge (a vessel) in navigable waters.

The assumption on page 15 of the petition that "in the opinions that have come out of (the First, Third and Fourth Circuits), it appears that their views would be consistent with the position of petitioner here, that is, in each case the dual inquiry would be made, and the fact that an accident occurred over navigable water would not be enough, and of itself, to create coverage under the LHWCA where the type of employment was not maritime in character" is clearly not borne out by the cases cited[5]. All three of these decisions involved accidents that occurred shoreside. Moreover, in *Graziano* the Court distinguished *Dravo Corp.* and held that a shipyard's maintenance-mason's work was maritime employment. Also, in its recent decision in *LeMelle v. B. F. Diamond Const. Co.*, 4 Cir., 674 F.2d 296, the Fourth Circuit has now joined the Fifth Circuit in cases of this character, specifically holding a concrete finisher on the James River bridge, who was injured over water, to be engaged in maritime employment, quoting thusly from its prior decision in *Brown & Root, Inc. v. Joyner*, 4 Cir., 607 F.2d 1087, 1090, certiorari denied, 446 U.S. 981, 100 S.Ct. 2960, 64 L.Ed.2d 837:

> "We are confident that employment held to be traditionally maritime under the former act has not been stripped of its maritime character by the 1972 amendments.

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[5] *Graziano v. General Dynamics Corp.*, 1 Cir., 663 F.2d 340; *Dravo Corp. v. Banks*, 3 Cir., 567 F.2d 593; and *Caldwell v. Ogden Sea Transp., Inc.*, 4 Cir., 618 F.2d 1037.

CONCLUSION

For the foregoing reasons it is suggested that petitioner's application for a writ of certiorari in this case should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this _____ day of _____, 1982, served a copy of the foregoing brief on all counsel to this proceeding by mailing same by United States mail, properly addressed and first class postage prepaid.

_____

GERARD M. DILLON